

May 12, 2014

**VIA FEDEX AND EMAIL (R9FOIA@EPA.GOV)**

United States Environmental Protection Agency, Region 9  
Attention: FOIA Officer, OPA-3  
75 Hawthorne Street  
San Francisco, CA 94105

**Re: Freedom of Information Act Request**

Dear Freedom of Information Act Officer:

We respectfully submit this request for information pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”). As you might know, President Obama issued an executive memorandum instructing all federal agencies to adopt a presumption of disclosure when administering requests under FOIA:

All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA. (See Memorandum from President Obama to the Heads of Executive Departments and Agencies regarding the Freedom of Information Act, January 21, 2009.)<sup>1</sup>

The United States Attorney General subsequently issued a memorandum to the Executive Departments and Agencies emphasizing that “an agency should not withhold information simply because it may do so legally” and that “whenever an agency determines that it cannot make full disclosure of a requested record, it must consider whether it can make partial disclosure [and] be mindful that the FOIA requires them to take reasonable steps to segregate and release nonexempt information.” (See Memorandum for Heads of Executive Departments and Agencies, March 19, 2009.)<sup>2</sup>

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<sup>1</sup> This memorandum is available at [http://www.whitehouse.gov/the\\_press\\_office/FreedomofInformationAct](http://www.whitehouse.gov/the_press_office/FreedomofInformationAct) (last visited May 9, 2014).

<sup>2</sup> This memorandum is available at <http://www.usdoj.gov/ag/foia-memo-march2009.pdf> (last visited May 9, 2014).

### **Definitions**

As used in this request, the term “record(s)” includes, without limitation, any handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail (“e-mail”) or facsimile, and every other means of recording upon any tangible thing, any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored. This term includes, but is not limited to, all correspondence, notes, memoranda, and e-mails sent or received directly or by copy.

As used in this request, the term “pertaining to” means, without limitation, in any way mentioning, containing, opining about, constituting, explaining, pertaining to, referring to, alluding to, responding to, elaborating upon, concerning, memorializing, proving, tending to prove, supporting, refuting, evidencing, connected with, commenting on, regarding, discussing, showing, describing, reflecting, analyzing, recording, including, mentioning, setting forth, in respect of, and about.

As used in this request, the terms “you” and “your” shall mean all Divisions of the United States Environmental Protection Agency Region 9, and all employees, managers, agents, representatives, investigators, consultants, attorneys, and any other person or entity acting on behalf of the United States Environmental Protection Agency, Region 9.

### **Information Requested**

Please provide copies of all records in your possession or control that are responsive to the following categories of information requested:

1. The State Water Resources Control Board’s (State Water Board) request to use the two-concentration test design to evaluate toxicity tests using the Test of Significant Toxicity hypothesis to comply with the Code of Federal Regulations (C.F.R.), title 40, sections 136.3 and 136.5, dated February 12, 2014;
2. EPA Region 9’s March 17, 2014 approval letter approving of the State Water Board’s February 12, 2014 request, as signed by Eugenia McNaughton, Ph.D. (included as Attachment A);
3. Any and all records pertaining to the State Water Board’s February 12, 2014 request or Attachment A discussed in the preceding paragraph; and
4. Any and all records pertaining to or otherwise related to any request for an alternate test procedure for chronic whole effluent toxicity under 40 C.F.R. Part 136.

As required by the Act, please provide a response within twenty (20) days from the receipt of this letter, stating your determination regarding this request. *See* 5 U.S.C. § 552(a)(6)(A).

Should you decide any of the requested material is exempt from disclosure under the Act, please describe in detail the material withheld and specify the legal basis and authority for withholding the requested material. Such description should include, but need not be limited to: the type of record and number of pages; the full name and title of the author of the record; the date of the record; the full name and title of the addressee of the record; the full name and title of all persons to whom the record was circulated; the title, "re" line, and headings from within the record, unless doing so would reveal properly exempted material; a detailed description of the entire content of the record; the custodian of the record at the time of this request; and the number of the record category to which the record responds. *See* 5 U.S.C. § 552(b); *Coastal Corp. v. Department of Energy*, 496 F. Supp. 57, 60-64 (D. Del. 1980); *ACLU Foundation v. Department of Justice*, 833 F. Supp. 399, 402-405 (S.D.N.Y. 1993).

Please also provide us with all non-exempt portions of all responsive records that are reasonably segregable from the withheld material, identifying the length and location of the withheld portion on the non-withheld portion of the record. 5 U.S.C. § 552(b).

If the cost of duplication of the responsive documents exceeds \$50, please contact me regarding the cost as we may prefer to review the responsive documents, and after review, bring in a copy service or pay the cost of duplication for only those documents we select. *See accord* 5 U.S.C. § 552 (a)(4)(A)(v).

Please contact me by phone at (916) 520-5254 or by email at [aporter@downeybrand.com](mailto:aporter@downeybrand.com) if you have any questions regarding this request, or would like to discuss how we might assist in your response to this request. We would be happy to work with you to obtain this information in an expedited manner through clarifications of any issues pertaining to these requests. Thank you for your prompt attention to this matter.

Very truly yours,

DOWNEY BRAND LLP



Ashley M. Porter

## **ATTACHMENT A**



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION IX

75 Hawthorne Street  
San Francisco, CA 94105

March 17, 2014

Renee Spears  
Quality Assurance Officer  
State Water Resources Control Board  
1001 I Street  
Sacramento CA 95814

Dear Ms. Spears:

This letter address the State Water Resources Control Board (State Water Board) request of February 12, 2014 to use the two –concentration test design to evaluate toxicity tests using the Test of Significant Toxicity (TST) hypothesis to comply with the Code of Federal Regulations, title 40, section 136.3 and 136.5. The EPA Region 9 Quality Assurance Office (QAO) has reviewed your request, justification and supporting documentation.

I am pleased to inform you that we have determined that the State Water Board's proposed use of the two-concentration toxicity test evaluated using the Test of Significant Toxicity (TST) is an acceptable equivalent under the ATP process to the five-concentration test evaluated using NOEC-LOEC hypothesis testing recommended in 40 CFR Part 136.5. While the results of the TST should generally be similar to those of the NOEC-LOEC test, it improves understanding of discharge condition by correctly identifying toxic and non-toxic samples more often than when using the latter. In summary, we agree that when using the TST statistical approach, the use of the two-concentration is an appropriate test design.

Please note that approval is in this case state-wide, that is, it will apply to all new or revised NPDES permits issued by the State Water Board and Regional Water Quality Control Boards and any EPA-issued California permits that include whole effluent toxicity testing provisions.

Please contact me (415-972-3411) if you have further questions.

Sincerely,

Eugenia McNaughton, Ph.D.  
Manager, Quality Assurance Office